No.

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IN THE

Supreme Court of the United States

October Term, 1984

PETER NAPOLITANO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Was the Court of Appeals decision correct in holding that when the government fails to indict a defendant within thirty days of arrest, as required by 18 United States Code § 3161(b) (Speedy Trial Act of 1974), dismissal of the indictment under 18 U.S.C. § 3162(a)(1) is warranted only where the section of law charged in the indictment is identical to that in the original complaint, irrespective of the fact that the charge in the indictment arose out of the identical episode charged in the underlying complaint?

TABLE OF CONTENTS

	PAGE
Question Presented	I
Table of Authorities	III
Orders Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	10

APPENDICES

Appendix A—Relevant Portion of the Decision of the United States Court of Appeals for the Second Circuit, Decided May 3, 1985	1a
Appendix B—Memorandum of Decision and Order of the District Court, Dated October 10, 1984	8a
Appendix C—Complaint Filed Against Petitioner, Dated October 1, 1982	14a
Appendix D—Indictment Filed Against Petitioner, Dated May 24, 1984	18a

TABLE OF AUTHORITIES

PAGE

Cases:

United States v. Heldt, 745 F.2d 1275 (9th Cir. 1984) 5
United States v. Pollock, 726 F.2d 1456 (9th Cir. 1984) 5, 9

Statutes:

18 U.S.C. § 371 4
18 U.S.C. § 1014 3
18 U.S.C. § 2113(b) 4
Speedy Trial Act of 1974, 18 U.S.C. § 3161, *et seq.* *passim*
28 U.S.C. § 1254(1) 3

Other Authorities:

A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, (Fed. Judicial Center 1980) 6, 7, 8
Federal Rules of Criminal Procedure, Rule 11(a)(2) 4

No.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Peter Napolitano ("Napolitano") petitions for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, which affirms a judgment of conviction entered in the United States District Court for the Eastern District of New York.

Orders Below

A published opinion was issued by the United States Court of Appeals for the Second Circuit on May 3, 1985, Docket No. 84-1447, *slip. op.* 3631-3640 (2d Cir. 1985). In that opinion the Court of Appeals affirmed a Memorandum of Decision and Order of the United States District Court for the Eastern District of New York, dated October 10, 1984. The opinions of the Court of Appeals and the District Court are set forth in Appendices A and B respectively.

Jurisdiction

The judgment of the Court of Appeals affirming the Memorandum of Decision and Order of the District Court was dated and entered on May 3, 1985.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

Statutes Involved

18 U.S.C. § 3161(b)

§ 3161. Time limits and exclusions

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

18 U.S.C. § 3162(a)(1)

§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the

administration of this chapter and on the administration of justice.

28 U.S.C. § 1254

§ 1254, Courts of Appeals; certiorari appeal; certiorari questions

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of *certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Statement of the Case

In September 1982 petitioner opened a bank account under a false name into which he deposited $173,997. in stolen checks. Several weeks later he withdrew $58,000.

On September 30, 1982, petitioner was arrested at the bank. He gave a full confession to the Federal Bureau of Investigation.

On October 1, 1982 the government filed a detailed four page complaint charging petitioner with making a false statement on a loan or credit application pursuant to 18 U.S.C. § 1014.

As of October 30, 1982, the date by which an indictment was required to have been filed under 18 U.S.C. § 3161(b), no action was taken.

On May 24, 1984, approximately 20 months after the arrest and filing of the (still undismissed) complaint, an

indictment was filed charging petitioner with one count each of conspiracy 18 U.S.C. § 371, and bank larceny, 18 U.S.C. § 2113(b). The two count indictment charged the same conduct and was based on the identical criminal episode as alleged in the original complaint.

On July 26, 1984 petitioner moved to dismiss the indictment with prejudice on the grounds that the twenty month delay between the date of arrest and the return of the indictment violated the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.*

On October 10, 1984 the District Court in a Memorandum of Decision and Order denied petitioner's motion to dismiss.

On October 19, 1984, petitioner pled guilty to bank larceny (18 U.S.C. § 2113(b)) preserving his right to appeal pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. On December 7, 1984 petitioner was sentenced to five years in jail.

Upon review of petitioner's argument that his rights under 18 U.S.C. § 3161(b) and 3162(a)(1) were violated, the United States Court of Appeals in an Opinion dated May 3, 1985, Docket No. 84-1447, *slip op.* 3631-3640 (2d Cir. 1985) affirmed petitioner's judgment of conviction.

On June 3, 1985, petitioner surrendered to begin serving his five year sentence.

Reasons for Granting the Writ

If the decision of the Court of Appeals is permitted to stand, a significant aspect of the Speedy Trial Act of 1974 will be rendered meaningless. A prosecutor merely by changing the section of law charged, would be able to avoid the requirement of 18 U.S.C. § 3161(b) that an indictment be filed within thirty days from the date on which an individual is arrested or served with a summons. This is in spite of the fact that on the day of arrest all facts surrounding the incident may be known to the prosecutor and the belatedly filed indictment arises pursuant to the identical set of facts, charges the identical period of time and the identical episode as the original undismissed complaint.

Only two circuits have considered this issue—the Second Circuit in this case and the Ninth Circuit in *United States* v. *Pollock*, 726 F.2d 1456 (9th Cir. 1984) and *United States* v. *Heldt*, 745 F.2d 1275 (9th Cir. 1984).

It is petitioner's contention that both circuits misinterpreted the legislative history and intent of Congress in passing § 3162(a)(1) of the Speedy Trial Act of 1974. § 3162(a)(1) requires that if no complaint is filed within the time limit required (thirty days), such "*charge* against that individual contained in such complaint, shall be dismissed or otherwise dropped," (emphasis added). In petitioner's case there was a twenty month hiatus between the filing of the original undismissed charge and the subsequent indictment.*

* The complaint and indictment are reproduced in Appendices C and D. A comparison of the two documents indicates that they arise out of the same criminal episode and that all charges and facts contained in the two count indictment filed on May 24, 1984 were known at the time the complaint was filed in October 1, 1982.

The legislative history of the Speedy Trial Act and an analysis of the statute itself would indicate a broad rather than restrictive interpretation of the term "charge." The words "offense," "charges" and "case" appear interchangeably in § 3162(a)(1). It would seem that Congress intended the generally accepted meaning of all three terms in determining what the government must "charge" within the statutory thirty day period, that is, all reasonable facts and occurrences known regarding the "case," "charge," or "offense" alleged in the original complaint. Otherwise there is no explanation for the use of the three different terms in the same section of law.

The Speedy Trial Act was first introduced in the Senate in June 1970. It was then reintroduced in the Ninety-Second and Ninety-Third Congresses (1971-1972). A one day hearing on the bill was held in April 1973 and reported to the full Senate Judiciary Committee with Amendments in March or April of 1974.

On July 23, 1974 the Senate passed the bill with neither debate or amendment. See A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, (Fed. Judicial Center, 1980) at 15 [hereinafter cited as *Partridge*].

The Senate version of § 3162 went through three stages and contained explicitly broad language until literally the last moment before the bill passed. In the original bill of 1972, § 3162(a) provided that "*such dismissal shall forever bar prosecution for the offense charged and for any other offense required to be joined with the offense.*" H.R. 7107, 92d Cong., 1st Sess., 117 Cong. Rec. 9063 (April 1, 1971); *see also* S.895, 92d Cong. 1st Sess., 117 Cong. Rec. 3407 (Feb. 22, 1971), *Partridge* at 290.

The 1972 Senate Subcommittee bill provided that such dismissal shall forever bar prosecution for "*any offense based on the same conduct or arising from the same criminal episode, and any other offense required to be joined with the offense,*" S.754, 93d Cong., 1st Sess., 119 Cong. Rec. 3265 (Feb. 5, 1973), *see also* H.R. 17409, 93d Cong., 2d Sess., 120 Cong., Rec. 35775 (Oct. 16, 1974), *Partridge* at 301.

The final 1974 Senate bill passed without debate provided the words as they presently apear in § 3162(a)(1).

Neither the Senate nor the Senate subcommittee that considered the bill debated the deletion of the words "*an offense based on the same conduct or arising from the same criminal episode and any other offense required to be joined with the offense.*" The Senate briefly debated the issue of sanctions for violations of § 3162(a) and (b), but not the issue of what "episodes," "transactions," "offenses," "charges," etc., were encompassed by the sanctions, *Partridge,* at 33. Since there was no debate on the question of whether indictment beyond the thirty-day period for the same or similar acts, offenses, charges or cases as had been charged in an earlier complaint would trigger the Act's provisions, the reasons for the omission of the broader language remain unclear.

After July 1974 the Senate bill was referred to the House Judiciary Committee's Subcommittee on Crime. The House subcommittee restored the provision for dismissal with prejudice which the Senate had eliminated, and the full Judiciary Committee added a sentence making it clear that dismissal with prejudice would apply to those offenses "*which were known or reasonably would have*

been known at the time of dismissal," 1974 House Committee Bill § 3162(a)(1). *Partridge,* at 345.

The final version of the bill that was sent to the House on November 27, 1974 read, ". . . *dismissal with prejudice shall only apply to those offenses which were known or reasonably should have been known at the time of dismissal."* H.R. 17409, 93d Cong., 2d Sess., (1974), *Partridge* at 345.

Three days later, the last day of the Ninety-Third Congress, December 20, 1974, the bill was taken up by the House. The Christmas recess was imminent. Without explanation and it would seem, because of the rush engendered by the holiday, the language cited above was left out of the statute. See 120 Cong. Rec. 41793-95 (Dec. 20, 1974).

Partridge, at 195-222, on which the courts below rely for the legislative history of the Act, contains a compilation of all materials relating to the Senate and House versions of the Speedy Trial Act.

These materials reveal that the focus of Congressional debate was the sanction provisions of the second paragraph of § 3162(a), and that no discussion occurred regarding whether dismissal (with or without prejudice) would cover the same transaction, act, offense, episode, crime, section of law, case or facts as were known or should have been known at the time the complaint was filed.

On the day the Act was passed, December 20, 1974, an amendment that related only to the issue of dismisssal

with prejudice was proposed and accepted. This amendment was then codified in the second sentence of 3162(a). The fact that the words "offenses which were known or should have been known," were omitted at this time seems to have been an oversight and not that "*Congress implicitly rejected the broad constituency of the dismissal sanction,*" *Pollock,* 1726 F.2d at 1462-63, *Napolitano,* Docket No. 84-1447, *slip op.* 3631-3640 (2d Cir. 1985), at 3636. There seems to have been no Congressional awareness that the amendment that was being rushed through on the last day of Congress omitted words that could be the subject of controversy. Certainly there is no evidence of the "implicit rejection" that the courts below have found. It is appropriate for this Court to consider all the circumstances surrounding the passage of the Act, and the other words used in the same section of law to determine Congressional intent.

To clarify the meaning of the statute and to insure that an accused brought into the federal system of criminal justice is brought to trial within the reasonable periods of time provided for by Congress, it is incumbent upon this Court as the final arbiter to construe the intent of Congress and the meaning of the terms "case," "charges" and "offenses," as provided in 18 U.S.C. § 3162(a)(1).

Conclusion

It is respectfully submitted that Peter Napolitano's petition for a writ of certiorari should be granted.

Dated: New York, New York
June 28, 1985

Respectfully submitted,

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APPENDICES

APPENDIX A

Relevant Portion of the Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1032—August Term, 1984

(Argued: April 12, 1985 Decided: May 3, 1985)

Docket No. 84-1447

UNITED STATES OF AMERICA,

Appellee,

v.

PETER NAPOLITANO,

Defendant-Appellant.

Before:

VAN GRAAFEILAND and CARDAMONE, *Circuit Judges,* and POLLACK, Senior District Judge.*

Appeal from denial of the sanction of dismissal of an indictment for violation of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*; the indictment, which charged bank larceny, was filed 20 months after defendant's arrest in connection with an unprosecuted complaint that charged defendant

* Honorable Milton Pollack, United States District Judge for the Southern District of New York, sitting by designation.

with opening the bank account by using a false loan or credit application. Defendant also appeals his sentence which was imposed after a hearing which included hearsay information from informants whose identity and whereabouts were not disclosed, and at which defendant was precluded from ascertaining whether informants were in a Witness Protection Program.

Affirmed.

JOHN H. JACOBS, P.C., New York, New York (with Jill Harris, New York University School of Law, on the brief), *for Defendant-Appellant.*

PATTY MERKAMP STEMLER, Assistant United States Attorney, New York, New York (Raymond J. Dearie, United States Attorney for the Eastern District of New York; Samuel Rosenthal, Chief, Appellate Section, Criminal Division, Department of Justice, Washington, D.C.; Jerry D. Bernstein, Special Attorney, Organized Crime Branch, Department of Justice, Brooklyn, N.Y., of Counsel), *for Appellee.*

POLLACK, *Senior District Judge:*

Defendant, Peter Napolitano, was arrested on September 30, 1982; the next day the government filed a complaint charging defendant with applying for a bank account at a Citibank branch in Hicksville, Long Island, under a false name ("Louis Ferolito"), address, and bank reference, in violation of 18 U.S.C. § 1014. The complaint also charged that defendant, on September 29, 1982, had deposited four checks into the account without authority, and had withdrawn $58,000 from it using a false name. The checks which defendant deposited had been stolen. Defendant

was arrested at the bank while attempting to make another, larger, withdrawal from the account. As of October 30, 1982, the date by which an indictment was required to be filed under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (the "Act"), no action had been taken by the government.

On May 24, 1984 approximately 20 months after defendant's arrest, an indictment was returned charging defendant with one count each of bank larceny in violation of 18 U.S.C. § 2113(b) and conspiracy to commit the same in violation of 18 U.S.C. § 371. The indictment, however, did not charge defendant with the offense for which he had been initially arrested. Defendant was arraigned on June 1, 1984.

On June 20, 1984, approximately one month after the indictment, it was discovered that the original complaint against defendant had never been dismissed. The government thereupon dismissed it.

On July 26, 1984, defendant moved to dismiss the indictment, with prejudice, on the ground that the 20 month delay between the date of his arrest and the return of the indictment violated his rights under the Speedy Trial Act. The District Court (Judge Mishler) denied defendant's motion, finding that the charges contained in the indictment were not included in the initial complaint filed against the defendant and holding that "when an indictment is not filed within 30 days of arrest, only the offense or offenses charged in the original complaint must be dismissed" and "[t]herefore, the Act's dismissal sanction is not applicable to these charges."

On October 19, 1984, defendant pleaded guilty to the bank larceny charge, and, on December 7, 1984, he was sentenced to five years imprisonment and a $5000.00 fine.

At the time he entered his plea, Napolitano reserved his right to bring this appeal, pursuant to Rule 11(a)(2), Fed. R. Crim. P., challenging the District Court's denial of his motion to dismiss the indictment. Defendant also appeals from the District Court's imposition of sentence, claiming that the sentence was based on hearsay testimony of unnamed informants, and further, that he was precluded from ascertaining whether the informants were in the Witness Protection Program, in violation of his Fifth Amendment due process rights.

I. *Speedy Trial Act.*

Defendant claims that the 20 month delay between his arrest on September 30, 1982, and his indictment on May 24, 1984, violated his rights under 18 U.S.C. §§ 3161(b) and 3162(a)(1). Section 3161(b) sets forth the time limit in which the government must seek an indictment: "Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. . . ."

Section 3162(a)(1) sets for the sanction for non-compliance with § 3161(b): "If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against the individual contained in such complaint shall be dismissed or otherwise dropped. . . ."

Defendant contends that the Act bars prosecution not only for the charge alleged in the complaint, but also for

any conduct "aris[ing] out of the same criminal episode" which was "known or reasonably should have been known" at the time the complaint was filed. Defendant claims that the same facts underlie both the later indictment and the earlier complaint and that the government cannot avoid the Act simply by changing the charges brought.

The statutory language is clear: it requires dismissal only of "*such* charge against the individual contained in *such complaint.*" 18 U.S.C. § 3162(a)(1) (emphasis added). "Absent a clear indication of legislative intent to the contrary, the statutory language controls its construction." *Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 158 n.3 (1981).

Moreover, the legislative history of the Act clearly indicates that Congress considered and rejected defendant's suggestion that the Act's dismissal sanction be applied to subsequent charges if they arise from the same criminal episode as those specified in the original complaint or were known or reasonably should have been known at the time of the complaint.

The Act went through numerous drafts. The initial drafts, which Congress rejected, contained sanction provisions requiring the dismissal with prejudice of any indictment brought more than 30 days after arrest if such indictment charged an offense which was "required to be joined with the offense [stated in the complaint]," H.R. 7107, 92d Cong., 1st Sess., 117 Cong. Rec. 9063 (April 1, 1971); *see also* S. 895, 92d Cong., 1st Sess., 117 Cong. Rec. 3407 (Feb. 22, 1971), or, charged an "offense based on the same conduct or arising from the same criminal episode, and any other other offense required to be joined with the issue," S. 754, 93d Cong., 1st Sess., 119 Cong.

Rec. 3265 (Feb. 5, 1973), *see also* H.R. 17409, 93d Cong., 2d Sess., 120 Cong. Rec. 35775 (Oct. 16, 1974), or, charged "offenses which were known or reasonably should have been known at the time of dismissal," H.R. 17409, 93d Cong., 2d Sess. (1974). The Act was amended and narrowed on the House floor to express only its present very limited application. *See* 120 Cong. Rec. 41793-95 (Dec. 20, 1974). *See generally* A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974* 194-95 (Fed. Judicial Center 1980).

Based on the legislative history, the Ninth Circuit, in *United States* v. *Pollock,* 726 F.2d 1456 (9th Cir. 1984), and *United States* v. *Heldt,* 745 F.2d 1275 (9th Cir. 1984), has held "that when the government fails to indict a defendant within 30 days of arrest, section 3162(a)(1) requires dismissal of *only* the offense or offenses charged in the original complaint." *Pollock,* 762 F.2d at 1462 (emphasis added). The Court reasoned that "Congress implicitly rejected the broad construction of the dismissal sanction urged by [defendant]. . . . This language would have required courts to engage in the complex task of investigating the relationship between the conduct underlying the offenses charged in the complaint and the conduct underlying the offenses listed in the indictment." *Pollock,* 726 F.2d at 1462-63 (citations omitted).

Contrary to defendant's argument, the Eleventh Circuit, in *United States* v. *Reme,* 738 F.2d 1156 (11th Cir. 1984), has not read the dismissal sanction as having a much broader application. That Court has acknowledged that "[a]n arrest triggers the running of § 3161(b) of the Speedy Trial Act only if the arrest is for the same offense for which the accused is subsequently indicted. . . .

The time limitation for indicting an accused does not begin to run if the accused is arrested for an unrelated offense." *Reme,* 738 F.2d at 1162, *quoting United States* v. *Brooks,* 670 F.2d 148, 151 (11th Cir.), *cert. denied,* 457 U.S. 1124 (1982).

Similarly, the defendant's reliance on language in *United States* v. *Nixon,* 634 F.2d 306, 309 (5th Cir.), *cert. denied,* 454 U.S. 828 (1981), *United States* v. *Cabral,* 475 F.2d 715, 718 (1st Cir. 1973), and *United States* v. *DeTienne,* 468 F.2d 151, 155 (7th Cir. 1972), *cert. denied,* 410 U.S. 911 (1973), is misplaced. Those cases hold only that a subsequent prosecution may be barred if it is based on an indictment which merely "gilds" an earlier charge or if the subsequent charge is a mere difference in accusational dates. In this case, the initial charge against the defendant for making a false application for a bank account was entirely different from and based on different proof than the later indictment for larceny of bank funds.

* * *

Affirmed.

APPENDIX B

Memorandum of Decision and Order of the District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR 84-00332

October 10, 1984

UNITED STATES OF AMERICA,

against

PETER NAPOLITANO,

Defendant.

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MISHLER, District Judge

Defendant moves to dismiss the indictment with prejudice on the grounds that the provisions of the Speedy Trial Act (18 U.S.C. § 3161(b)) have been violated.

FACTS

Sometime in September 1982, defendant opened a bank account at a Citibank branch in Hicksville, L.I., N.Y. in a false name. He deposited $173,997.07 in stolen checks into it. On September 29, 1982, defendant withdrew $58,000 from that account.

On September 30, 1982, defendant was arrested at the bank allegedly attempting to make another large withdrawal from his account. After being arrested, defendant made incriminating statements to the F.B.I. and agreed to cooperate with the government. On October 7, 1982 defendant changed his mind and decided not to cooperate.

On October 1, 1982, the United States Attorney's office filed a complaint which charged defendant with a single count of making a false statement on a loan or credit application (18 U.S.C. § 1014). As of October 30, 1982, the date by which an indictment was required to be filed under the Speedy Trial Act, no action had been taken by the government.

On May 24, 1984, approximately 20 months after defendant's arrest, an indictment was returned. It charged defendant with one count each of conspiracy (18 U.S.C. § 371) and bank larceny (18 U.S.C. § 2231(b)). It, however, did not charge him with the offense for which he had been initially arrested. Defendant was arraigned on June 1, 1984.

On June 20, 1984, approximately one month after the indictment, it was discovered that the original complaint against defendant had never been dismissed. The government thereupon dismissed it.

Defendant now moves to dismiss the indictment with prejudice on the grounds that the 20-month delay between the date of his arrest and the return of the indictment violated his rights under the Speedy Trial Act. The government opposes the motion on the grounds that

1. The indictment presents no speedy trial issues, since it consists of new charges which were not part of the original complaint; or

2. Alternatively, the indictment should not be dismissed because the factors to be considered in ruling on this motion weigh in favor of the government.

Discussion

The Speedy Trial Act requires that an "indictment charging an individual with the commission of an offense shall be filed within 30 days from the date on which such individual was arrested or served with a summons in connection with such charges." 18 U.S.C. § 3161(b). The Act further provides that if the indictment is not filed within the time required "such charge against that individual contained in such complaint shall be dismissed or otherwise dropped." 18 U.S.C. § 3162(a)(1).

While there are several circuits which have interpreted the permissive scope of the dismissal sanction of the Speedy Trial Act, they only provide the court with limited guidance because of the lack of consensus among them. For example,

the Ninth Circuit has construed the dismissal sanction very narrowly. *See United States* v. *Pollack,* 726 F.2d 1456, 1462 (1984). They interpret § 3161(a)(1) as mandating "the dismissal or *only* the offense or offenses charged in the original complaint" when an indictment is not timely filed. *Id.* (emphasis added).

On the other hand, the Eleventh Circuit has read the dismissal sanction as having a much broader application. *See United States* v. *Reme,* 738 F.2d 1156, 1162 (1984). They hold that the running of the Speedy Trial Act is triggered when the charges contained in the indictment are *connected or related* to the offense for which the defendant was arrested. *See id.* (emphasis added).

The Fifth Circuit has also considered the issue. Their interpretation is in accord with the holding rendered by the Ninth Circuit, but subject to qualification. *See United States* v. *Nixon,* 634 F.2d 306, 309, *cert. denied,* 102 S. Ct. 120 (1981). They hold that the time limitations of the Speedy Trial Act only apply when the crime for which defendant was arrested and the crime charged in the indictment are one and the same. *See id.* However, they qualify their holding by warning that "if the second charge is but a part of or only guilds the initial charge, the initial arrest would start the critical period for trial." *Id.*

Since the circuits are not in complete accord, we turned to the Legislative History of the Speedy Trial Act for clarification of this issue. A review of the legislative history establishes that there was a great deal of controversy surrounding the passage of the Speedy Trial Act. *See* Speedy Tril Act, H.Rep.No. 93-1508, 93rd Cong., 2d Sess. 4, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7401,

7404. There was a concern on the part of some that the passage of the Act would result in an inordinate number of case dismissals because of the federal court system's inability to act within the established time limits. *Id.* at 7402-3. The bill went through much discussion and many revisions before it was finally passed. *See id.* at 7402.

An initial draft of the bill provided that the dismissal sanction would apply to all charges based on the same conduct. *Id.* at 7429. This language, however, did not find its way into the final version of the bill passed by Congress. In fact, the statute contains very specific language: "[*S*]*uch* charge against *that* individual contained in *such* complaint shall be dismissed. . . ." 18 U.S.C. § 3162(a)(1). Such specificity leads this court to conclude that Congress purposely intended the dismissal sanction to have a very narrow application. We, therefore, adopt the Ninth Circuit's construction of § 3162(a)(1) and hold that when an indictment is not filed within 30 days of arrest, only the offense or offenses charged in the original complaint must be dismissed.

Applying this holding to the instant action, we find that we must deny defendant's motion to dismiss the indictment. The indictment filed against defendant charged him with one count each of conspiracy (18 U.S.C. § 371) and bank larceny (18 U.S.C. § 2113(b)). However, the initial complaint, filed the day after defendant was arrested, only charged him with a single count of making a false statement on a loan or credit application (18 U.S.C. § 1014). Since the charges contained in the indictment were not included in the initial complaint filed against the defendant, the 20-month interval between the arrest and

the indictment did not violate the provisions of the Speedy Trial Act. Therefore, the Act's dismissal sanction is not applicable to these charges.

Defendant's motion to dismiss the indictment is denied, and it is

So Ordered.

/s/ Jacob Mishler

Jacob Mishler
U.S.D.J.

APPENDIX C

Complaint

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(T. 18, U.S.C. § 1014)

UNITED STATES OF AMERICA,

against

PETER NAPOLITANO,

Defendant.

EASTERN DISTRICT OF NEW YORK, ss:

WILLIAM H. LYNCH, JR., being duly sworn, says that he is a Special Agent of the Federal Bureau of Investigation duly appointed according to law and acting as such.

Upon information and belief, on or about the 24th day of September, 1982, within the Eastern District of New York, with the intent to knowingly make a false statement to an institution the accounts of which are insured by the Federal Deposit Insurance Corporation upon an application for a bank account, (*sic*).

The source of your deponent's information and grounds for his belief are:

1. On or about September 29, 1982 your deponent was informed by Jane Sixt, an Assistant Manager of Citibank, 255 N. Broadway, Hicksville, L.I., that the banks' examination of an account bearing the name "Louis Ferolito" with the account number 4840988 indicated the following:

(a) "Louis Ferolito" had opened the account on or about September 24, 1982 and made the following statements on the account application form: that his address was 35 Circle Drive, Westbury, New York; that his business telephone was 742-6999 and his former employer was located at 37 Cohoes Avenue, Westbury; that he had an account at the Long Island Trust Company on Old Country Road in Plainview, New York bearing account number 5056147-0799;

(b) Bank personnel determined through a check of the Coles Directory that the home and former business address were not listed, that the business telephone number was not a working number, further that the account at the Long Island Trust Company was non-existent.

(c) Bank personnel determined that on Septmber 29, 1982 four deposits totalling approximately $86,000 had been made to the account in four separate branches of Citibank and that on September 29, 1982 "Louis Ferolito" had withdrawn approximately $58,000.

2. On September 30, 1982 I was informed as follows by Hugh McKinnon, an Assistant Vice President of the bank, and other bank personnel concerning the bank's examination of the checks which formed the various deposits:

(a) That the payees were located throughout the United States;

(b) That the checks were all drawn on Citibank and that most of the checks were drawn on a single Citibank account;

(c) That all the checks bore two endorsements, one by the payee and one by "Louis Ferolito";

(c) That in a telephone call to one payee located in Pittsburgh, Pennsylvania the payee told Mr. McKinnon, that she expected to receive a check from Citibank but that it had not arrived.

3. On or about September 30, 1982 the defendant Peter Napolitano told your deponent initially that his name was "Louis Ferolito" but thereafter admitted that his true name was Peter Napolitano. The defendant Peter Napolitano also told your deponent that he had opened the account through the use of several pieces of false identification and that he had made the withdrawals from said account.

4. Upon your deponent's search of the trunk of the automobile of the defendant Peter Napolitano, following his consent to search, your deponent discovered $27,500 in currency under a cover for a spare tire.

5. Your deponent has been informed by bank personnel that the aforementioned withdrawal of $58,000 was converted by "Louis Ferolito" into money orders totally (*sic*) $30,000 and cash of $28,000.

WHEREFORE, your deponent respectfully requests that the above-mentioned defendant Peter Napolitano be dealt with according to law.

/s/ WILLIAM H. LYNCH, JR.

Sworn to before me this
1st day of October, 1982

/s/ A. SIMON CHREIN

Eastern District of New York
United States Magistrate

A TRUE COPY
name illegible

U.S.M. E.D.N.Y.
A. SIMON CHREIN

APPENDIX D

Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CR No. 84-332
(18 U.S.C. §371
18 U.S.C. §2113(b)
18 U.S.C. §2)

UNITED STATES OF AMERICA,

against

PETER NAPOLITANO,

Defendant.

THE GRAND JURY CHARGES:

COUNT ONE

1. On or about and between September 24, 1982 and September 30, 1982, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant Peter Napolitano unlawfully, willfully and knowingly combined, conspired, confederated and agreed with others known and unknown to the Grand Jury to commit an offense against the United States, namely to take and carry away, with intent to steal and

purloin, from Citibank, N.A. (hereinafter "the bank"), the deposits of which were then insured by the Federal Deposit Insurance Corporation, approximately $173,997.07, belonging to and in the care, custody, control, management and possession of the bank, in violation of Title 18, United States Code, Section 2113(b).

2. It was a part of the conspiracy that the defendant Peter Napolitano, aided and abetted by others known and unknown to the Grand Jury, would open a checking account (hereinafter "the Louis Ferolito account") at the bank using the false name "Louis Ferolito."

3. It was further a part of the conspiracy that the defendant Peter Napolitano, aided and abetted by others known and unknown to the Grand Jury, would deposit into the Louis Ferolito account at the bank approximately $173,997.07 in stolen and falsely endorsed checks.

4. It was further a part of the conspiracy that the defendant Peter Napolitano, aided and abetted by others known and unknown to the Grand Jury, using falsely made and falsely endorsed checks drawn on the Louis Ferolito account, would withdrawn from the Louis Ferolito account, in the form of cash and money orders, the $173,997.07 previously deposited therein.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendant Peter Napolitano and others known and unknown to the Grand Jury committed the following overt acts, among others, within the Eastern District of New York and elsewhere:

1. On or about September 27, 1982, the defendant Peter Napolitano, using the name Louis Ferolito, opened the Louis Ferolito account (account number 48440988) at the Hicksville branch of the bank with a $100 cash deposit and provided a false address, social security number, date of birth, employment information and other account information to the bank.

2. On or about September 27, 1982, the defendant Peter Napolitano deposited into the newly opened Citibank, N.A. checking account of Jeffrey and Diane Marks (hereinafter "the Jeffrey and Diane Marks account") eighteen stolen checks totalling approximately $15,524.90, at the Mineola, Hicksville and Westbury branches of the bank.

3. On or about September 28, 1982, the defendant Peter Napolitano deposited into the Louis Ferolito account, at the Hicksville, Mineola, Plainview, Westbury and Syosset branches of the bank, twenty-seven stolen checks totalling approximately $86,105.43.

4. On or about September 29, 1982, the defendant Peter Napolitano deposited into the Louis Ferolito account, at the Hicksville, Mineola and Garden City branches of the bank, twenty-four stolen checks, including three stolen checks from the Jeffrey and Diane Marks account, all totalling aproximately $87,891.64.

5. On or about September 29, 1982, the defendant Peter Napolitano using a check drawn on the Louis Ferolito account and made payable to Louis Ferolito, withdrew $58,000.00 from the Louis Ferolito account consisting of $28,000.00 in cash and $30,000.00 in thirty $1,000 money orders, at the Hicksville branch of the bank.

6. On or about September 30, 1982, the defendant Peter Napolitano went to the Hicksville branch of the bank with a check drawn on the Louis Ferolito account and made payable to Louis Ferolito in the amount of $43,000.00.

7. On or about September 30, 1982, John Zummo had a telephone conversation with the defendant Peter Napolitano.

8. On or about September 30, 1982, Robert Vastola, a/k/a "Bobby Vass," had a telephone conversation with the defendant Peter Napolitano.

(Title 18, United States Code, Section 371)

COUNT TWO

On or about September 29, 1982, within the Eastern District of New York, the defendant Peter Napolitano, aided and abetted by others known and unknown to the grand jury, did take and carry away, with intent to steal and purloin, from Citibank, N.A., the deposits of which were then insured by the Federal Deposit Insurance Corporation, the sum of $58,000, belonging to and in the care, custody, control, management and possession of the bank.

(Title 18, United States Code, Sections 2113(b) and 2.)

A TRUE BILL

(Illegible)

FOREMAN

RAYMOND J. DEARIE
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

By: RONALD E. DEPETRIS

RONALD E. DEPETRIS
Acting United States Attorney
Pursuant to 28 C.F.R., §0.131